

Vertical Agreements

The regulation of distribution practices
in 37 jurisdictions worldwide

2012

Contributing editor: Stephen Kinsella OBE



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Hungary

Chrysta Bán

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Antitrust law

- 1** What are the legal sources that set out the antitrust law applicable to vertical restraints?

Vertical restraints are regulated under chapter IV of Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition (the Competition Act). Chapter IV on Prohibition of Agreements Restricting Economic Competition regulates both horizontal and vertical agreements restricting competition. Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) (formerly articles 81 and 82 of the EC Treaty), as well as all Commission regulations, including the new Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of article 101(3) of the TFEU to categories of vertical agreements and concerted practices, Commission Regulation (EU) No. 267/2010 of 24 March 2010 on the same in the insurance sector and Commission Regulation No. 461/2010 of May 2010 on the same in the motor vehicle sector also have direct application in Hungary. Government Decree No. 205/2011. (X.7.) regulates the rules of certain group exemptions from the general prohibition of vertical restraints. Regulations listed under question 7 are also relevant in the field of vertical restraints. Below we discuss only the relevant Hungarian regulations in force as at 31 January 2012.

Types of vertical restraint

- 2** List and describe the types of vertical restraints that are subject to antitrust law. Is the concept of vertical restraint defined in the antitrust law?

Agreements and concerted practices between companies, as well as the decisions of the social organisations of companies, public bodies, unions and other similar organisations of companies and unions with the purpose of preventing, restricting or distorting economic competition, or which may display or in fact display such an effect, are prohibited. The prohibition, in particular, applies to the following:

- fixing retail prices or defining other business conditions directly or indirectly;
- restricting manufacture, distribution, technical development or investment or keeping them under control;
- dividing the sources of supply and restricting the freedom of choosing from among them, as well as excluding specific consumers from the purchase of certain goods;
- dividing the market, excluding any party from selling, and restricting the choice of means of sales;
- preventing any party from entering the market;
- discriminating against certain partners with respect to transactions of an identical value or of the same nature which causes disadvantage to certain business partners in the competition; and

- rendering the conclusion of a contract conditional upon undertaking any commitment which, due to its nature or with regard to the usual contractual practice, does not form part of the subject of the contract.

The above practices are prohibited in horizontal and vertical contexts. No specific definition of vertical restraint is given in the Competition Act. The above activities or types of agreements do not provide an exhaustive list of the prohibited activities, but constitute the most common restrictions of trade prohibited by law.

Legal objective

- 3** Is the only objective pursued by the law on vertical restraints economic, or does it also seek to promote or protect other interests?

The primary purpose of the law is to protect competition and consumers' welfare; nevertheless, as a side effect it also protects the survival of smaller businesses and through this – indirectly – employment relations as well.

Responsible authorities

- 4** Which authority is responsible for enforcing prohibitions on anti-competitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

Enforcement of prohibitions on anti-competitive vertical restraints is delegated to the Office of Economic Competition, which is an independent organ established by law. The government and ministers do not have authority over the enforcement of antitrust matters.

Jurisdiction

- 5** What is the test for determining whether a vertical restraint will be subject to antitrust law in your jurisdiction? Has the law in your jurisdiction regarding vertical restraints been applied extraterritorially? Has it been applied in a pure internet context and if so what factors were deemed relevant when considering jurisdiction?

Generally, Hungarian competition law applies to the market conduct of any natural and legal persons and unincorporated business associations, regardless of their domicile, displayed in the territory of Hungary, unless otherwise provided for by law. The market conduct displayed by companies abroad also falls under the scope of the Competition Act and other antitrust regulations, if the effect of such conduct manifests itself within Hungary.

Agreements concluded by public entities

- 6 To what extent does antitrust law apply to vertical restraints in agreements concluded by public entities?

Public or state-owned entities are not exempted from antitrust law in Hungary.

Sector-specific rules

- 7 Do particular laws or regulations apply to the assessment of vertical restraints in specific sectors of industry (motor cars, insurance, etc)? Please identify the rules and the sectors they cover.

Specific regulations apply to horizontal and vertical restraints in different industries as follows:

- Government Decree No. 86/1999 (VI.11) on exempting certain groups of technical transfer agreements from the general prohibition of restraints;
- Government Decree No. 202/2011. (X.7.) on exempting certain groups of specialisation agreements from the general prohibition of economic restraints;
- Government Decree No. 19/2004. (II.13.) on exempting certain groups of agreements in the motor vehicle sector from the general prohibition of restraints;
Government Decree 204/2011. (X.7.) on exempting certain groups of the motor vehicle after-market sector from the general prohibition of restraints;
- Government Decree No. 203/2011. (X.7.) on exempting certain groups of agreements in the insurance sector from the general prohibition of restraints; and
- Government Decree No. 206/2011. (X.7.) on exempting certain groups of agreements in the field of research and development.

General exceptions

- 8 Are there any general exceptions from antitrust law for certain types of agreement containing vertical restraints? If so, please describe.

Agreements concluded between non-independent companies are exempted from the prohibitions. Companies belonging to the same company group and which are controlled by the same companies are considered non-independent.

Agreements of minor importance are not subject to the general prohibition. An agreement is of minor importance if the total joint share of the parties concluding the agreement and of the companies that are not independent from such parties does not exceed 10 per cent in the market in question, except if the agreement pertains to the fixing of the purchase or selling prices between competitors, or the dividing of the market among competitors.

Certain groups of vertical restraints are exempted by the government by decree from the general prohibitions of the Competition Act (see as listed under questions 1 and 7). The general prohibition does not apply to an agreement if:

- it improves the efficiency of production or distribution, or promotes technical or economic development, or the improvement of means of environmental protection or competitiveness;
- a fair part of the benefits arising from the agreement is conveyed to the consumer;
- the concomitant restriction or exclusion of economic competition does not exceed the extent required for attaining the economically justified common goals; or
- it does not contain facilities for the exclusion of competition in connection with a considerable part of the goods concerned.

The rule of minor importance does not apply to an agreement that is able to create an environment, in conjunction with other

agreements of the like, whereby competition in the relevant market is substantially obstructed, restricted or distorted.

Group exemptions established by a government decree from the prohibition of restrictive market practices shall not apply to an agreement if the conditions laid down above are not satisfied as a result of the impact it creates in the particular market in conjunction with other similar agreements.

Agreements

- 9 Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction?

Agreements are not defined in the Competition Act or other relevant regulations. For the purposes of competition law agreements, written or oral, in the sense of civil law agreements are not required to establish an illegal act; concerted practices can be found to be against the law as well.

- 10 In order to engage the antitrust law in relation to vertical restraints, is it necessary for there to be a formal written agreement or can the relevant rules be engaged by an informal or unwritten understanding?

No formal written agreement is required to establish that the vertical antitrust rules have been violated. Oral agreements, unwritten understandings and concerted practice or behaviour of the parties may also qualify as vertical restraint of trade.

Parent and related-company agreements

- 11 In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?

Rules on the prohibition of vertical restraints do not apply to agreements between companies that are not independent. Companies that belong to the same company group and those that are controlled by the same companies are considered non-independent. A company is regarded as part of the same group of any company:

- that it controls independently;
- that controls it independently;
- that is controlled by a company referred to in the second point above; or
- that is controlled jointly by any two or more of the companies referred to under the above points and the company.

A company has direct control over another if:

- it holds over 50 per cent of the shares, stock or voting rights in the other company;
- it has the power to designate, appoint or dismiss the majority of the executive officers of the other company;
- it has the power, by contract, to assert major influence over the decisions of the other company; or
- it acquires the ability to assert major influence over the decisions of the other company.

A company has indirect control over another company when the latter is controlled, whether independently or jointly, by one or more companies under the control of the former.

True joint ventures (with 50-50 per cent control) do not belong to either of their parent groups (ie, a true joint venture is considered to be unrelated to its controllers).

Agent–principal agreements

- 12** In what circumstances does antitrust law on vertical restraints apply to agent–principal agreements in which an undertaking agrees to perform certain services on a supplier's behalf for a sales-based commission payment?

In accordance with section 1(8) of Act CXVII of 2000 on independent commercial agency agreements, the rules of the Competition Act will also apply to those agency agreements that restrict competition. Typically, if the agent acts on behalf of the seller, enters into agreements that benefit and oblige the seller directly, then the relationship between the seller and the agent is not considered as restricting competition. On the other hand, if the agent acts on its own behalf, for example, it makes its own investments, takes title over the products, keeps own stock of the goods, participates in the promotion of the products, bears significant costs or risk of the business itself, it may be considered as a distributor (retailer), in which case rules on prohibition of vertical restraints shall apply.

- 13** Where antitrust rules do not apply (or apply differently) to agent–principal relationships, is there guidance (or are there recent authority decisions) on what constitutes an agent–principal relationship for these purposes?

See question 12.

Intellectual property rights

- 14** Is antitrust law applied differently when the agreement containing the vertical restraint also contains provisions granting intellectual property rights (IPRs)?

Antitrust law, including certain group exemption rules, also apply to the transfer or licensing of intellectual property rights, where the grant of such rights is ancillary to the sale or resale of a product.

Analytical framework for assessment

- 15** Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

Agreements and concerted practices between companies that are aimed at the prevention, restriction or distortion of economic competition, or that may display or in fact display such effect, are prohibited. The most typical activities and types of agreements prohibited by law are named by the Competition Act and listed in question 2.

All the above-listed and similar agreements and activities restricting economic competition are prohibited unless they fall under the scope of an exemption established by law. Exemptions from the prohibition of vertical restraints are of different legal character:

- agreements between companies that are related (not independent from each other) are always exempted from the prohibition (see details under question 11); and
- agreements that fall under the *de minimis* rule are also exempted. This exemption applies to agreements between companies whose total joint market share (together with the controlled companies' market shares) does not exceed 10 per cent, provided that the agreement does not establish:
 - fixing of purchase or retail prices between competitors; or
 - dividing of the market among competitors.

Consequently, in vertical relationships, if the seller and the purchaser are not competitors, and their joint market share does not exceed 10 per cent, they may even fix retail prices or apply territorial restrictions.

Several vertical agreements fall under the general vertical group

exemption rules or one of the specific industrial group exemption regulations (motor vehicle sector, insurance sector, technical transfer agreements, etc – see question 7). These exemption rules apply only to the extent and on the condition that the agreement in question meets the specific standards and requirements established by the relevant group exemption regulation.

An agreement containing vertical restraints may still be exempted from the prohibition if the parties can prove that:

- it contains facilities to improve the efficiency of production or distribution, or to promote technical or economic development, or the improvement of means of environmental protection or competitiveness;
- a fair part of the benefits arising from the agreement is conveyed to the consumer;
- the concomitant restriction or exclusion of economic competition does not exceed the extent required for attaining the economically justified common goals; and
- it does not contain facilities for the exclusion of competition in connection with a considerable part of the goods concerned.

The burden of proof to show that an agreement is exempted from the prohibition lies with the party who relies on the exemption.

- 16** To what extent are supplier market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other suppliers relevant? Is it relevant whether certain types of restriction are widely used by suppliers in the market?

In the event the seller's market share exceeds 30 per cent on the relevant market, the general group exemption rules do not apply. In addition to this, the Office of Economic Competition in its investigations always thoroughly researches the entire market, the market share of the different market participants, horizontal and vertical market structures and the behaviour of the competitors. The investigations also question how the behaviour of the individual company, together with the similar activity of the competitors, affect the market. Due to a modification of the Competition Act passed in 2005 (section 16/A), the group exemption rules cannot be applied to an agreement if, due to the cumulative effects of similar agreements, the goals and conditions of the group exemption rules (see question 8) do not realise on the market. In such cases the agreement is not exempted from the anti-competitive restraint rules for the future, but no fine can be imposed against the company at the time of the investigation. The cumulative effects of similar agreements of the competitors were examined in a vertical relationship, for example in case Vj-28/2007/42, where different beer distribution agreements were investigated.

Another economic factor always thoroughly investigated is under what conditions and how easily a new market participant (competitor) can establish a competing company in the given industry.

Competition possibilities between the local market participants and foreign competitors, especially within the EU region, are a target of higher scrutiny since Hungary is a member state of the European Union. Even if sales concentrate only on the Hungarian market, it is likely that the Office of Economic Competition will find that the situation has an effect on interstate trade, due to the fact that sometimes intensive sales – even if only within the territory of Hungary – may limit the realistic chance of foreign competitors to enter the Hungarian market.

- 17** To what extent are buyer market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other buyers relevant? Is it relevant whether certain types of restriction are widely agreed to by buyers in the market?

The buyer's market share has always been an important and relevant factor and has been thoroughly investigated in cases of exclusive

supply obligations. Since the entry into effect of Government Decree 205/2011. (X.7.) on the general group exemptions from the prohibition of vertical restraints (General Block Exemption Decree), the possibility of applying the group exemption rules is excluded in the event the market share of the buyer exceeds 30 per cent on the market of purchasing the relevant products and/or services.

Block exemption and safe harbour

18 Is there a block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please explain how this block exemption or safe harbour functions.

As discussed in questions 1, 7 and 8, the government, based on the authorisation of the Competition Act, established certain block exemption rules in the field of general commercial relationships, the motor vehicle sector, the insurance sector, the transfer of technology, the technical specification and the research and development agreements. Agreements that fall under the scope of one or the other block exemption rules are exempted from the general prohibition of horizontal or vertical restraints, provided that the agreement in question meets in all respects the rules and requirements of the given block exemption regulations. In the following we address only the most important rules of the General Block Exemption Decree on exempting certain groups of vertical agreements from the prohibitions on vertical restraints.

The General Block Exemption Decree provides an exemption status only to those vertical agreements that meet all of the following requirements:

- the seller's market share on the relevant market does not exceed 30 per cent;
- the market share of the purchaser does not exceed 30 per cent of the relevant market; and
- the goal of the agreement, directly or indirectly, in itself or together with other elements under the control of the parties, is not the:
 - limitation of the purchaser in establishing its own resale prices independently, except that the parties may establish a recommended or a maximised retail price; or
 - limitation of the purchaser in establishing its territory of sale or the scope of its customers, except the:
 - limitation of active sales to territories and customers maintained and delegated to other exclusive distributors, or maintaining the right of seller to enter into sales transactions;
 - limitation of a wholesaler to sell to end customers;
 - limitation of sales in a selective distribution system to non-authorised distributors;
 - limitation of the purchaser to sell spare parts to customers who would use such spare parts for the manufacture of similar goods;
 - limitation of the members of a selective distribution system in their active and passive sales to end customers;
 - limitation of the members of a selective distribution system to sell to each other; and
 - limitation of the seller to sell spare parts to end customers, repair shops or other service providers.

Should the agreement fail to meet any of the provisions listed above, then the agreement is not eligible for exemption under the General Block Exemption Decree.

In addition to the above, certain provisions cannot validly be agreed upon. In accordance with these:

- agreements including an obligation on the purchaser not to manufacture, purchase, sell or resell competing goods, or that it has to purchase more than 80 per cent of its merchandise

exclusively from the seller, may not validly be agreed upon for an indefinite term or for a term exceeding five years;

- the purchaser may not validly be limited in its purchasing, sales or retail activities following the termination of the distribution agreement (some exemptions apply); and
- members of a selective distribution system may not be limited in selling competing products of certain competitors.

Types of restraint

19 How is restricting the buyer's ability to determine its resale price assessed under antitrust law?

Retail price fixing is generally prohibited. The only way to influence the level of retail prices by the seller is to establish a recommended retail price, as long as there is no pressure whatsoever by the seller to force the application thereof as an actual retail price, or, alternatively, to set a maximum retail price by the seller or the parties together.

20 Have the authorities considered in their decisions or guidelines resale price maintenance restrictions that apply for a limited period to the launch of a new product or brand, or to a specific promotion or sales campaign; or specifically to prevent a retailer using a brand as a 'loss leader'?

The very few cases handled in this field in Hungary do not suggest any policy established by the Competition Office in this regard. Any vertical retail price arrangement would be likely to be considered illegal, unless it falls under one of the statutory exemptions.

21 Have decisions or guidelines relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

Cartel cases are always rigorously investigated, covering all potential factors of the forbidden restraints and all different elements of the market behaviour of the affected companies. Each case that is investigated for potential retail price fixing is investigated together with other factors of vertical restraints, including territorial sales restrictions and potential related horizontal restraints. We are unaware of any case where the authorities attributed a positive effect to a restraint.

22 Have decisions or guidelines relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

We are unaware of any decision addressing this possibility.

23 How is restricting the territory into which a buyer may resell contract products assessed? In what circumstances may a supplier require a buyer of its products not to resell the products in certain territories?

Generally, it is not allowed to restrict the purchaser in selling in certain territories; however, the seller may appoint another exclusive distributor to a certain territory, or may maintain a certain territory to itself, in which case limitation of active sales to those territories by the purchaser is allowed.

24 Explain how restricting the customers to whom a buyer may resell contract products is assessed. In what circumstances may a supplier require a buyer not to resell products to certain resellers or end-consumers?

Generally, it is not allowed to restrict the purchaser in selling to certain customers, except that limitation of sales is allowed in the following cases:

- sales to a certain group of customers retained for the seller or delegated to another exclusive distributor;
- in case of a selective distribution system, sales to non-contractual retailers can be excluded;
- purchasers may be limited in selling spare parts to customers who would use such spare parts for the manufacturing of similar goods; and
- a wholesaler may be restricted from selling to end-customers.

25 How is restricting the uses to which a buyer puts the contract products assessed?

In general, it might be concluded that sellers or purchasers may not be restricted in selling spare parts for servicing, repair and maintenance purposes. On the other hand, sale and resale may be restricted when spare parts would be sold to purchasers who would manufacture goods out of the spare parts similar to that of the goods sold by the seller.

26 How is restricting the buyer's ability to generate or effect sales via the internet assessed?

To our best knowledge so far no decision of the Office of Economic Competition has addressed the question of sales via the internet in the field of vertical agreements.

27 Have decisions or guidelines on vertical restraints distinguished in any way between different types of internet sales channel?

See question 26.

28 Briefly explain how agreements establishing 'selective' distribution systems are assessed. Must the criteria for selection be published?

The General Block Exemption Decree allows the establishment of a selective distribution system under which only approved companies can be members of the distribution system and such members may legally undertake an obligation that they do not sell to retailers who are not approved members of the network and that they do not carry out active sales activities on the territory of another member of the network. However, passive sales to end customers may not be restricted. The selective system may be established based on a quantitative or on a qualitative basis. In a quantitative system the seller may set the maximum number of retailers, while in a qualitative system the seller has to enter into an agreement with all retailers who meet the qualitative requirements and apply for a membership in the network.

29 Are selective distribution systems more likely to be lawful where they relate to certain types of product? If so, which types of product and why?

In our view, in the field of motor vehicle distribution it is more likely that the market participants and the distribution agreements will comply with the relevant regulations. Primarily, because there is a separate group exemption regulation dealing exclusively with motor vehicle distribution systems, it is therefore more evident which rules have to be followed in this field. In addition, motor vehicle wholesalers are usually also large multinational companies selling under the same terms in the European Union, and are therefore familiar with the legal regulations and more likely to introduce similar systems in different EU countries, with the goal of complying with antitrust and group exemption rules. They are big enough to have in-house lawyers or outside legal counsel who can assist the distribution structure and terms.

30 In selective distribution systems, what kinds of restrictions on internet sales by approved distributors are permitted and in what circumstances? To what extent must internet sales criteria mirror offline sales criteria?

So far no specific legal regulations or case law exist that regulate internet sales in the field of vertical sales agreements.

31 Has the authority taken any decisions in relation to actions by suppliers to enforce the terms of selective distribution agreements where such actions are aimed at preventing sales by unauthorised buyers or sales by authorised buyers in an unauthorised manner?

We are unaware of any such decisions.

32 Does the relevant authority take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market?

Yes, the Competition Office in its investigation makes a broad survey and examines the potential cumulative effects of similar activities of the competitors.

33 Has the authority taken decisions dealing with the possible links between selective distribution systems and resale price maintenance policies? If so, what are the key principles in such decisions?

Selective distribution systems are regulated by the general principles of price fixing: mainly, that no retail price fixing is allowed. Influencing the retail price is possible only by setting a maximum retail price or through a recommended retail price. Even this latter tool is valid only if it is not used in an abusive way – by forcing the retailers to follow the recommended price in each sale – or if there is no other duress or undue influence exercised by the wholesaler to set the retail price.

34 Has the authority taken decisions (or is there guidance) concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products?

We are unaware of such decisions.

35 How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?

Under the General Block Exemption Decree the retailer may be required to purchase its stock exclusively from the seller, provided that the seller's market share does not exceed 30 per cent on the relevant market. Further, an agreement containing exclusivity may not be concluded for an indefinite term or for a term longer than five years. This latter rule also applies for agreements under which the purchaser has to purchase more than 80 per cent of its entire sales (calculated on the previous business year's figures) from the same seller. Selective distribution agreements may not contain an obligation on the purchaser under which products of certain competitors may not be purchased and sold by the purchaser.

36 How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?

We are unaware of any such assessment.

37 Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed.

See question 35.

38 How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

See question 35.

39 Explain how restricting the supplier's ability to supply to other resellers, or sell directly to consumers, is assessed.

Under the General Block Exemption Decree the seller may agree to sell all of its products exclusively to the purchaser, provided that neither his, nor the purchaser's market share on the relevant market exceeds 30 per cent. The supplier may always maintain certain territories or customers for itself. In a selective distribution system cross-sales to each other by the distributors cannot be limited.

40 To what extent are franchise agreements incorporating licences of IPRs relating to trademarks or signs and know-how for the use and distribution of products assessed differently from 'simple' distribution agreements?

Hungarian antitrust law does not address franchise agreements per se. Therefore, their terms and validity need to be reviewed in accordance with the general rules of the Competition Act, the General Block Exemption Decree and the potential other exemptions discussed above.

41 Explain how a supplier's warranting to the buyer that it will supply the contract products on the terms applied to the supplier's most-favoured customer or that it will not supply the contract products on more favourable terms to other buyers is assessed.

In a selective or other distribution system the supplier may legally agree to provide the same (equal) conditions to each member of the distribution system. Discrimination among purchasers that cannot be supported by sound economic or other factors may qualify as a violation of antitrust law, especially if the seller qualifies as having a dominant market position. A requirement on the buyer not to source its contract products on more favourable terms from other suppliers may result in a de facto non-compete obligation.

42 Explain how a buyer's warranting to the supplier that it will purchase the contract products on terms applied to the buyer's most-favoured supplier or that it will not purchase the contract products on more favourable terms from other suppliers is assessed.

Any undertaking to the effect that the buyer would reject and would not buy below a certain price would qualify as restraint of trade, and as such illegal. We are unaware of any actual decision of the Hungarian Office of Economic Competition on the particular issue of application of a most favoured supplier's terms. Such an arrangement would be thoroughly investigated in order to decide whether it had a negative effect on competitive pricing among competitors or on competition in the market in general. We believe that such an undertaking would be most likely to qualify as illegal.

Notifying agreements

43 Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.

There is no formal procedure under which agreements containing vertical restraints can be notified with the Office of Economic Competition, nor can a negative clearance procedure be initiated.

Authority guidance

44 If there is no formal procedure for notification, is it possible to obtain guidance from the authority responsible for antitrust enforcement or a declaratory judgment from a court as to the assessment of a particular agreement in certain circumstances?

The Office of Economic Competition does not issue negative clearance opinions or provide any other preliminary opinion in connection with individual agreements containing restraints. All decisions of the Office issued in actual cases are published and they may include useful findings and guiding interpretation on different questions. Occasionally the Office issues non-binding guidelines on certain interpretation issues which are also very informative.

Complaints procedure for private parties

45 Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

Private parties may initiate the proceeding of the Office of Economic Competition either by completing a form questionnaire available for this purpose (report) or by informing the Office about their complaint. The reporter has to complete the questionnaire and provide the fact pattern that is the basis of its complaint. The reporter may request to maintain its anonymity. The investigator acting on behalf of the Office has to decide within 60 days (which can be extended by another 60 days) whether to initiate official investigation proceedings or to decline the case and reject it as one without basis. The reporter may challenge the rejecting resolution at the competent court within eight days. Complaints that do not qualify as a report are treated as a complaint, in which case the investigator has to come up with its decision within 30 days (this deadline may be extended). Decisions rejecting a complaint may not be challenged in court.

Enforcement

46 How frequently is antitrust law applied to vertical restraints by the authority responsible for antitrust enforcement? What are the main enforcement priorities regarding vertical restraints?

The Office of Economic Competition is rarely involved in cases of vertical restraints. During 2003 there were four vertical restraints cases out of a total of 20 cartel cases. This figure was eight out of 28 in 2004; 11 out of 25 in 2005; five out of 19 in 2006; and three out of 15 in 2007. In 2008, out of the 21 cartel cases there were only two vertical cartel proceedings, while in 2009 out of the 20 cartel proceedings three were vertical restraints cases. Fines were imposed only in very few cases. It seems that the priority of the authority is to make the participants of the proceedings undertake to modify their agreement or behaviour in order to comply with the law.

47 What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

It is a general rule of the Hungarian legal system that contracts that violate the law are null and void. If certain provisions of a contract are illegal, only those provisions will be declared null and void. The entire contract will be nullified only if the parties would not have entered into the contract without the inclusion of the illegal provisions in question. Therefore, there is a legal possibility for one party of the contract containing an illegal vertical restraint to challenge the validity and enforceability of a certain provision or the entire contract at court, but it will not necessarily nullify the entire contract.

Update and trends

Now that the latest group exemption regulations of the EU have been introduced into Hungarian legislation, we do not expect further modifications in the near future.

- 48 May the authority responsible for antitrust enforcement directly impose penalties or must it petition another entity? What sanctions and remedies can the authorities impose? What notable sanctions or remedies have been imposed? Can any trends be identified in this regard?

The Office of Economic Competition may impose a fine on the wrongdoer in its own authority, without consulting courts or other organs. In addition to imposing a fine, the Office may:

- declare the activity illegal;
- order the termination of the illegal act or the illegal circumstances; and
- order the carrying-out of certain obligations.

The sanctions that the Office of Economic Competition may apply in cases of vertical restraints are the following:

- declaration of the activity or agreement illegal;
- obligation to stop the illegal activity; and
- imposition of a fine, the amount of which is limited to 10 per cent of the net sales revenue of the company group in the previous business year.

There have been few decisions made in connection with vertical restraints and even less imposed fines. It can be concluded that in the field of vertical restraints the actual trend of the Economic Competition Office is making the parties modify their agreement and bring it into compliance with the law, rather than imposing a fine.

Investigative powers of the authority

- 49 What investigative powers does the authority responsible for antitrust enforcement have when enforcing the prohibition of vertical restraints?

The investigators of the Office of Economic Competition may:

- demand the handing over of any evidence and provide all information from the parties and any third party that is relevant in the case;
- prepare copies of written documents or any media or data storage device;
- seize any evidence;
- enter into and search sites or motor vehicles; and
- use police assistance for the above if necessary.

Private enforcement

- 50 To what extent is private enforcement possible? Can non-parties to agreements containing vertical restraints obtain declaratory judgments or injunctions and bring damages claims? Can the parties to agreements themselves bring damages claims? What remedies are available? How long should a company expect a private enforcement action to take?

According to the Competition Act (sections 11(3) and 88/A) any consequences which are attached by the Competition Act to any infringement of the prohibition of horizontal and vertical restraints apply concurrently with the legal consequences prescribed by the Civil Code in connection with contracts that violate the provisions of the legal rules. Section 88/A emphasises that civil law claims – which would include damages claims as well – arising in connection with agreements illegally restraining competition may be brought in the form of private enforcement directly before the courts of general civil law competence. Private enforcement of civil law claims, including damages claims, would be available for parties to the contract as well as to third parties in the event they can prove damages and causal connection between the illegal contract and the damage suffered. Such damages claims may be successful if the party in violation of law cannot excuse itself from the wrongdoing by proving that it acted in accordance with the generally expected care under the given circumstances (general rule of negligence).

Between parties which are both parties to the illegal contract the rule of contributory negligence may be an important factor in case of a damages claim. There are not yet enough court cases at this point that would allow an analysis of the situation and or a conclusion regarding when a court may accept a damages claim under such circumstances.

Private enforcement actions may take several years since the court in charge has a notification obligation to the Office of Economic Competition, which may interfere with the proceedings.

Other issues

- 51 Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

No.

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